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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	MM Docket No. 92-266
Cable Television Consumer Protection	)	
and Competition Act of 1992	)	
	)	
Rate Regulation	)	

REPLY COMMENTS

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

Paul J. Sinderbrand
Dawn G. Alexander

Sinderbrand & Alexander
888 16th Street, N.W.
Suite 610
Washington, D.C. 20006-4103
(202) 835-8292

Its Attorneys

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EXECUTIVE SUMMARY

The rules implementing the uniform pricing provisions of Section 623(d) must assure all consumers who reside in a franchise area where comptition is only partially present the full benefits of that competition, even consumers who cannot be served by the alternative service provider or choose not to receive service.

While WCA agrees with those cable interests who assert that discount pricing of service sold "in bulk" is permissible, so long as the discount is justified by reduced transaction costs, that pricing must be made available uniformly throughout the franchise area under Section 623(d). Moreover, the Commission cannot lawfully permit cable operators to charge consumers higher prices where no competition is present. The Commission must not allow a cable operator to charge lower rates to individual subscribers in multiple dwelling units (MDUs") where competition may be present than are charged to individual subscribers in single family homes or in MDUs that no competitor serves.

The Commission cannot deem each alternative multichannel video programming distributor in a market to have "comparable video programming" merely because some statistical penetration benchmark is achieved. Congress clearly mandated that the Commission undertake a qualitative, case-by-case examination of "comparability".

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Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
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Rate Regulation	)	

REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCA"),[1] by its attorneys and pursuant to § 1.415 of the Commission's Rules,[2] hereby submits its reply to certain of the initial comments filed in response to the *Notice of Proposed Rule Making* ("NPRM") commencing this proceeding.[3]

In its initial comments, WCA focused on four fundamental points: (1) the Commission must implement Section 623(d) of the Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992

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[1]WCA is the principal trade association of the wireless cable industry. Its members include the operators of virtually every wireless cable system in America, the licensees of Multipoint Distribution Service and Instructional Television Fixed Service stations utilized by wireless cable operators to distribute programming to subscribers, program suppliers, and equipment manufacturers.

[2]47 C.F.R. § 1.415 (1992).

[3]*Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-266, FCC 92-544 (rel. Dec. 24, 1992) [hereinafter cited as "*NPRM*"].

("1992 Cable Act"),[4] in such a way that cable systems are barred from discriminating against any consumer that resides in an area not served by an alternative service provider, or that chooses not to subscribe to an available alternative;[5] (2) the Commission must make a qualitative determination of whether a given competitor has video programming "comparable" to that of the franchised operator when adjudicating if that competitor can provide effective competition under Section 623(l);[6] (3) the Commission must protect the proprietary nature of wireless cable operators' subscriber information in implementing Section 623(l);[7] and (4) the Commission should employ the protected service area definition set forth in Section 21.902(d) of the Commission's Rules as determining the area in which a wireless cable system's service is offered for purposes of Section 623(I).[8] Because there was no substantial disagreement by those filing comments with WCA's latter two points, WCA will rest its case on its initial comments.[9] However, since the

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[4]Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 3, 9, 14, 106 Stat. 1460 (1992) (hereinafter cited as "1992 Cable Act").

[5]*See* Comments of WCA, MM Docket No. 92-266, at 2-5 (filed Jan. 27, 1993)[hereinafter cited as "WCA Comments"].

[6]*See id.* at 10-15.

[7]*See id.* at 8-10. *See also* Comments of Nationwide Communications, Inc., MM Docket No. 92-266, at 3-4 n.5 (filed Jan. 27, 1993)[hereinafter cited as "NCI Comments"].

[8]*See* WCA Comments, *supra* note 5, at 7-8.

[9]WCA should note, however, its objection to the suggestion by one cable operator that competitors to a franchised system be required to provide the FCC annually with "information on . . . residences or habitable units in the cable system's franchise area . .

(continued...)

cable industry has advocated positions that would effectively read out of the 1992 Cable Act both the uniform pricing requirement of Section 623(d) and the "comparable video programming" element of the effective competition test of Section 623(l), WCA will devote the remainder of these comments to those two issues.

I. THE RULES IMPLEMENTING THE UNIFORM PRICING PROVISIONS OF SECTION 623(D) MUST ASSURE ALL CONSUMERS IN A FRANCHISE AREA WHERE COMPETITION IS PARTIALLY PRESENT THE FULL BENEFITS OF THAT COMPETITION, EVEN CONSUMERS WHO CANNOT BE SERVED BY THE ALTERATIVE SERVICE PROVIDER OR CHOOSE NOT TO RECEIVE SERVICE.

As amended by the 1992 Cable Act, Section 623(d) requires that "a cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."[10] As WCA explained in its initial comments, this provision was adopted because cable systems, when faced with competition in just a portion of their franchise areas, typically have responded by initiating "rifle shot" marketing practices which benefit those who reside where

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[9](...continued)
.." Comments of Armstrong Utilities, Inc., MM Docket No. 92-266, at 6 (filed Jan. 27, 1993). While that information will certainly be relevant, there is no reason why the burden of producing that information should be placed on competitors, rather than on the franchised cable operator that is seeking relief from rate regulation. That information is as available to the franchised cable operator as it is to its competitors. Similarly, WCA opposes the suggestion by Tele-Communications, Inc. ("TCI") that non-cable multichannel video programming service providers report subscriber information by zip code "in order to make the data usable by all interest parties." Comments of Tele-Communications, Inc., MM Docket No. 92-266, at 11 (filed Jan. 27, 1993)[hereinafter cited as "TCI Comments"]. Since the relevant question under Section 623(l) is how many subscribers competitors have in the cable franchise area, and since zip code boundaries do not necessarily correlate to cable franchise area boundaries, there is no reason to require competitors to report subscriber data by zip code.

[10]47 U.S.C. § 543(d).

competition is present, at the expense of those living where no alternative exists.[11] Congress' goal in passing Section 623(d), simply stated, is to prevent such conduct by assuring that a cable operator maintain uniform pricing throughout its service area.[12]

A. Bulk Pricing Is Permissible, So Long As It Is Offered Uniformly Throughout The Franchise Area.

As WCA noted in its initial comments, it has no quarrel with the need of cable operators to adopt *bona fide* service categories. WCA does not disagree with those cable operators that claim that where service is sold "in bulk,"[13] the cable operator should be

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[11]*See* WCA Comments, *supra* note 5, at 3-4. The need for Section 623(d) was confirmed by numerous parties filing initial comments. For example, the League of California Cities noted that:

> A number of California cities have been plagued with cable operators which have price discriminated within a city between areas subject to overbuild competition and those in which the cable operator possessed a monopoly. Across-the-street neighbors residing within the same city have paid significantly different rates based upon the existence, or lack thereof, of a competing video provider and those situations have caused great concern to franchising authorities who have attempted to ensure equal treatment of all their citizens.

Comments of League of Cal. Cities, MM Docket No. 92-266, at 13-14 (filed Jan. 27, 1993).

[12]*See* S. Rep. No. 92, 102d Cong. 1st Sess., at p. 76.

[13]WCA uses the phrase "in bulk" to refer to those situations where programming is sold to, and paid for by, a condominium association, rental landlord, hospital, hotel or other commercial account for further distribution, and no separate charge is made to the individual recipients of that programming by the cable operator. In such cases, the lack of individualized billing and collection clearly results in reduced costs to the cable operator. Thus, a discount may be appropriate, provided that it is cost-justified by the cable operator. As will be addressed below, however, no departure from the uniform

(continued...)

permitted to charge lower rates that truly reflect reduced transaction costs without running afoul of the 1992 Cable Act.[14] However, *Section 623(d) requires that any bulk rate be made available uniformly throughout the franchise area, even where no competitor offers service.*[15] Section 623(d) plainly bars a cable operator from making special rates available where competition is present, and there is no indication in either the language of the 1992 Cable Act or its legislative history that Congress intended for bulk sales to be exempt from Section 623(d).

B. The Commission Cannot Lawfully Permit Cable Operators To Charge Consumers Higher Prices Where No Competition Is Present.

In transparent ploys to undercut the Congressional intent behind Section 623(d), cable interests are urging the Commission to permit cable operators to discriminate between similarly situated consumers based solely on whether a competitive alternative is present. For example the National Cable Television Association suggests that:

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[13](...continued)
pricing requirement should be permitted where the cable operator sells programming to individual subscribers in multiple dwelling unit settings.

[14]*See* Comments of Comcast Corp., MM Docket No. 92-266, at 64 (filed Jan. 27, 1993)[hereinafter cited as "Comcast Comments"]; Comments of Newhouse Broadcasting Corp., MM Docket No. 92-266, at 44 (filed Jan. 27, 1993); Comments of Nat'l Cable Television Ass'n, MM Docket No. 92-266, at 78 (filed Jan. 27, 1993)[hereinafter cited as "NCTA Comments"].

[15]The Commission should find most troubling the anti-competitive, discriminatory bulk pricing practices brought to light in the comments filed by Liberty Cable Company, Inc. ("Liberty") and Nationwide Communications, Inc. *See* Comments of Liberty Cable Corp., MM Docket No. 92-266, at 5-6 (filed Jan. 27, 1993)[hereinafter cited as "Liberty Comments"]; NCI Comments, *supra* note 7, at 3-7. Quite clearly, these practices are violative of Section 623(d).

> an operator may face competition in one portion of its system, but not others. Its ability to respond to that competition should not be hampered merely because it may not face similar competitive circumstances elsewhere on its system.[16]

Several cable operators represented by common counsel urge the Commission both to permit them to price lower in areas served by competitors than in other areas, and to exempt from the uniform pricing requirement the sale of programming to individual residents of multiple dwelling units ("MDUs") because competitors are more likely to offer service in MDUs.[17]

Each of these proposals should be summarily rejected by the Commission, for they are simply inconsistent with the plain language of the 1992 Cable Act, and bad public policy. Not surprisingly, no advocate for exceptions to the uniform pricing mandate of Section 623(d) has provided any reference to the language of the 1992 Cable Act or its legislative history supporting a departure from the plain language of Section 623(d). Congress mandated that "a cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is

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[16]NCTA Comments, *supra* note 14, at 67 n. 65.

[17]*See, e.g.* Comments of Falcon Cable Group, MM Docket No. 92-266, at 4 (filed Jan. 27, 1993)[hereinafter cited as "Falcon Comments"]; Comments of Adelphia Communications Corp., *et al*, MM Docket No. 92-266, at 130-136 (filed Jan. 27, 1993)[hereinafter cited as "Adelphia Comments"]; Comments of Nashoba Communications Limited Partnership, MM Docket No. 92-266, at 126-132 (filed Jan. 27, 1993)[hereinafter cited as "Nashoba Comments"]. *See also* Comments of Cole, Raywid & Braverman, MM Docket No. 92-266, at 48-49 (filed Jan. 27, 1993).

provided over its cable system"[18] precisely because it wanted to ban cable operators from cutting prices in portions of their franchise areas where competition exists, but not in other areas. Had Congress wanted the Commission to adopt a special policy for the MDU market, it presumably would have given explicit directions, such as it did in directing the Commission's implementation of Section 16(d).[19]

Strict implementation of Section 623(d) is particularly important to avoid cross-subsidization by consumers that lack access to competition of the lower rates charged those consumers fortunate enough to live where competition flourishes. Those advocating a relaxation of Section 623(d) conveniently ignore that "effective competition" can be found, and cable rates deregulated, even if competitive services are unavailable to 50% of the homes in a franchise area.[20] Thus, those who claim that "so-called cross-subsidization of customers in the overbuilt area by customers in the non-overbuilt area will not be possible unless sanctioned by rate regulatory authorities" are distorting the possible impact of their proposal.[21] There can and no doubt will be circumstances in which cable rates throughout a franchise area are deregulated, even though as many as one

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[18]47 U.S.C. § 543(d).

[19]*See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Cable Home Wiring*, FCC 93-73, MM Docket No. 92-260, at ¶ 10 (rel. Feb. 2, 1993).

[20]*See* 47 U.S.C. § 543(l)(1)(B).

[21]Adelphia Comments, *supra* note 17, at 134 n. 281; Nashoba Comments, *supra* note 17, at 130 n.278.

half of the homes lack access to an alternative service provider. Clearly, Congress did not intend for the residents of those areas unserved by competitors to fend for themselves -- rather, Congress intended for the uniform pricing requirement of Section 623(d) to serve as a proxy for actual competition so that competitive pricing would be extended even to those households within a franchise area that cannot actually subscribe to a competitive offering.

In short, to assure the achievement of Congress' goals the Commission must ban in no uncertain terms any discrimination between customers based directly or indirectly on whether a competitive service is available or subscribed to. Simply put, such a policy is the only way the Commission can assure realization of Congress' intent that all consumers within a franchise area enjoy the benefits of competition, even consumers that cannot subscribe to an alternative provider or choose not to.

II. THE COMMISSION CANNOT DEEM EACH ALTERNATIVE MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTOR IN A MARKET TO HAVE "COMPARABLE VIDEO PROGRAMMING" MERELY BECAUSE ALL ALTERNATIVE DISTRIBUTORS TOGETHER HAVE MORE THAN A 15% MARKET SHARE.

Given the fervor with which the cable industry has sought to undercut Congress' every effort to assure emerging alternatives to cable fair access to programming, it is not surprising that cable has urged the Commission to water down Congress' mandate that a multichannel video programming distributor have "comparable video programming" to that of the cable operator before it can be considered as a potential source of effective competition. What is surprising, however, is how shamelessly cable urges the

Commission to write the "comparable video programming" language right out of the 1992 Cable Act.

Perhaps the most blatant examples are those provided by Comcast Corporation ("Comcast") and TCI. Comcast urges the Commission to adopt "an irrebuttable presumption of 'comparability' for any 'multichannel' provider . . .,"[22] while TCI merely states that "[t]he Commission should not attempt to make [comparability] assessments."[23] One can only wonder why, if Congress intended for the Commission to establish such an irrebuttable presumption or to refrain from addressing comparability, it bothered to add the "comparable video programming" element at all. Suffice it to say that neither Comcast nor TCI cite a scintilla of evidence from the language of the 1992 Cable Act or its legislative history to support their proposed effective elimination of the "comparable video programming" requirement.

Other cable interests are only slightly more subtle, arguing that the Commission should presume comparability if the subscriber penetration of all of the alternative services combined reaches 15%.[24] While the Commission is required under the statute to count the subscribers of all competitors except the largest in determining whether the 15% benchmark of Section 623(I) is met, it would be inconsistent with the plain language of the 1992 Cable Act to presume that each of the smaller competitors has "comparable

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[22]Comments of Comcast Corp., MM Docket No. 92-266, at 13 (filed Jan. 27, 1992).

[23]TCI Comments, *supra* note 9, at 15.

[24]*See* Adelphia Comments, *supra* note 17, at 9-10.

video programming" merely because all of the smaller competitors combined have a 15% share of the market. Section 623(1)(1)(B) of the Cable Act specifically states that effective competition cannot exist unless "the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors, each of which offers comparable video programming to at least 50% of the households in the franchise area . . . ." [25] As WCA demonstrated in its initial comments, the underscored language assures that a cable system will remain rate regulated, even if several niche video systems are operating in the marketplace with small market shares, but none has the popular video programming necessary to draw a mainstream audience and effectively compete.[26] Congress has clearly determined that no multichannel video programming distributor's subscribers can be counted toward the 15% benchmark unless that particular distributor has comparable programming, and the Commission cannot presume otherwise.

Even if the Commission were to presume that only multichannel video programming distributors that alone have a market share greater than 15% have "comparable video programming," the result would be inconsistent with Congressional intent. Such an approach effectively renders the "comparable video programming" language of Section 623(l) without meaning, for it adds nothing to the 15% penetration benchmark established under the same section. The plain language of Section 623(l) makes clear that Congress intended for a more searching inquiry into the presence of

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[25] 47 U.S.C. § 543(1)(1)(B) (*emphasis added*).

[26] *See* WCA Comments, *supra* note 5, at 10-14.

"comparable video programming" than the mere assumption that it exists whenever the 15% penetration standard is met. While WCA does not necessarily believe that "comparable video programming" requires alternative providers to offer precisely the same programming, WCA does agree with Liberty and others who demonstrate that Congress intended for a qualitative judgement to be rendered.[27]

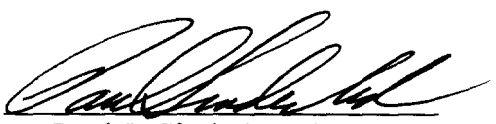
[27]Liberty Comments, *supra* note 15, at 16-17. *See also* Comments of Austin, TX, Dayton, OH, Dubuque, IA, Gillette, WY, Montgomery County, MD, St. Louis, MO, and Wadsworth, OH, MM Docket No. 92-266, at 19 (filed Jan. 27, 1993)("the number of channels, the type of programming, and the quality of signals offered must be adequate to present an alternative . . .."); Comments of DirecTv, Inc., MM Docket No. 92-266, at 4 (filed Jan. 27, 1993)("the FCC should read 'comparable' to require, at the very least, that an MVPD offer a variety of services and an approximately similar number of channels before it can be deemed to be offering service that is 'comparable' to that offered by a cable system.").

III. CONCLUSION.

WHEREFORE, for the reasons set forth above and in WCA's initial comments, WCA urges the Commission to adopt the rules and policies suggested by WCA to assure that Congress' policies concerning cable rate regulation are properly implemented, without imposing undue hardship on the emerging competitors to cable Congress was attempting to aid.

Respectfully submitted,

WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

By: 
Paul J. Sinderbrand
Dawn G. Alexander

Sinderbrand & Alexander
888 Sixteenth Street, N.W.
Suite 610
Washington, D.C. 20006-4103
(202) 835-8292

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